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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MELISSA BASTIAN,

PLAINTIFF,

-against-

Case No.:
13 Civ. 5972 (ALC) (GWG)

NEW YORK CITY DEPARTMENT OF EDUCATION,

DEFENDANT.
-----X

DATE: August 28, 2014

TIME: 2:18 P.M.

EXAMINATION BEFORE TRIAL of the
Defendant, NEW YORK CITY DEPARTMENT OF
EDUCATION, by a Witness, DAVID FANNING,
taken by the Plaintiff, pursuant to a Court
Order and to the Federal Rules of Civil
Procedure, held at the offices of New York
City Law Department, 100 Church Street,
New York, New York 10007, before
Joshua B. Edwards, RMR, CRR, a Notary
Public of the State of New York.

1

2 A P P E A R A N C E S:

3

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14 BY: SEAN RENAGHAN, ESQ., Assistant
15 Corporation Counsel
16 File #: 2013-041435
17 Control #: DDD12522

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1 D. FANNING

2 prevent you from testifying truthfully here
3 today?

4 A. No.

5 Q. Are you on any medication that
6 might inhibit your ability to testify
7 truthfully?

8 A. No.

9 Q. You are currently employed?

10 A. I am.

11 Q. Where are you employed?

12 A. I am employed by the New York
13 City Department of Education.

14 Q. What is your position with the
15 Department of Education?

16 A. I am a principal.

17 Q. Where are you a principal?

18 A. A. Philip Randolph Campus High
19 School.

20 Q. Where is that located?

21 A. 443 West 135th Street in
22 Manhattan.

23 Q. How many students currently
24 attend Randolph? I am just going to refer
25 to it as Randolph.

1 D. FANNING

2 A. That's fine.

3 Q. How many, currently?

4 A. Roughly 1,350.

5 Q. And that's grades 9 through 12?

6 A. It is.

7 Q. How long have you held that

8 position?

9 A. Since December 6, 2011.

10 Q. And do you know who held the

11 position prior to you?

12 A. I do.

13 Q. Who is that?

14 A. Mr. Henry Rubio.

15 Q. Do you know why Mr. Rubio left

16 A. Philip Randolph?

17 A. No.

18 Q. Do you know whether he was

19 terminated from employment?

20 A. I don't know.

21 Q. Now, as principal of A. Philip

22 Randolph, you are responsible for

23 overseeing the entire functioning of the

24 school, correct?

25 A. I am.

1 D. FANNING

2 and then I moved her somewhere else.

3 Q. So, is it fair to say that at
4 the time you moved Ms. Bastian to that
5 initial office --

6 A. Right.

7 Q. -- there was a community
8 associate working in that office?

9 A. Correct.

10 Q. Which community associate was
11 that?

12 A. Esperanza Cardi.

13 Q. And then Ms. Cardi was moved
14 from that office somewhere else once
15 Ms. Bastian was moved to that office?

16 A. Corrects.

17 Q. Now, Mr. Garcia, he is from the
18 Dominican Republic, correct?

19 A. I believe he is, yes.

20 Q. And Mr. Rubio, your predecessor
21 as principal, he was also Dominican,
22 correct?

23 A. I believe he is.

24 Q. Now, do you recall any days in
25 which Mr. Garcia came to school wearing an

1 D. FANNING

2 Afro wig with a pick in it?

3 A. Yes.

4 Q. Do you recall when that was?

5 A. I don't know the exact date.

6 But I believe we have senior pride days on
7 Fridays in the second term where seniors
8 dress up.

9 And there are some kind of
10 theme. I believe there was a '70s theme.
11 So, Gilberto came in had with a giant Afro
12 with, like, a Jimmy Hendrix-style bandana
13 on and the Indian clothes that were popular
14 at the time.

15 Q. Like a dashiki?

16 A. No, no, not Indian, Native
17 American. He was wearing, like, leather
18 stuff, like a leather vest and pants to
19 make him look like Jimmy Hendrix.

20 Q. Did you dress up that day?

21 A. No. No one needs to see that.

22 Q. Did any other administrators
23 dress up that day?

24 A. Not to my knowledge.

25 Q. So, Mr. Garcia was the only

1 D. FANNING

2 one?

3 A. He works in security.

4 Mr. Garcia works in security. He would do
5 things, sometimes interact with the kids.
6 I didn't think anything negatively of it.

7 He was clearly trying to
8 emulate a known '70s character. It was
9 funny. The kids thought it was funny. To
10 my knowledge, no one expressed being
11 offended by it.

12 Q. Do you recall whether there was
13 a staff meeting that day?

14 A. On a Friday? Unlikely; it's
15 possible.

16 Q. Do you recall Mr. Garcia at a
17 meeting walking in and gesturing to
18 Ms. Bastian and saying, "Fight the power,
19 sister"?

20 A. No, not at all.

21 Q. Did Ms. Bastian ever say
22 anything to you about Mr. Garcia dressing
23 in that manner that day?

24 A. Not to my recollection.

25 Q. Do you recall whether

1 D. FANNING

2 emotional disability. Guidance counselors
3 have that.

4 They also push into classrooms
5 to counsel kids on sex issues, health
6 issues, condoms. There is a lot of stuff
7 they do.

8 Q. Do they all work in the
9 guidance suite?

10 A. They do now. They did last
11 year, but they did not prior to that year.
12 Prior to the year, we spread them around
13 the building with the idea that there would
14 be additional adult guidance on the floors.
15 I have since moved them back to the 108
16 suite.

17 Q. To your knowledge, does
18 Ms. Bastian have a master's degree in
19 guidance counseling?

20 A. She does, yes, and she has a
21 New York State license in counseling.

22 Q. And how do you know that?

23 A. Because she applied for the
24 position of guidance counselor.

25 Q. Which one?

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2 A. Very recently, subsequent to
3 her filing this lawsuit, I posted an
4 vacancy of which, when Ms. Kaalund retired.
5 Ms. Kaalund announced her retirement at the
6 end of this year. This is all after she
7 filed all this.

8 I sent an e-mail out to the
9 faculty saying, hey, is anyone interested
10 in the counseling position? Just so you
11 know, it's on the Open Market. I posted
12 it. The only person from the faculty who
13 applied was Melissa. As a courtesy, I
14 included her in my hiring panel.

15 There are no rules as far as I
16 know about how you conduct hiring.
17 However, a best practice that I have done
18 at this school and the last school is that
19 we do have a hiring panel of teachers,
20 counselors, administrators when we do
21 interview candidates.

22 Q. And that is the position that
23 was awarded to Ms. Moronta?

24 A. She was selected. The hiring
25 committee selected Ms. Moronta as her

1 D. FANNING

2 choice.

3 Q. Ms. Moronta, is she Hispanic?

4 A. Yes.

5 Q. Let me just backtrack a second.

6 You said you now there was going to be a
7 vacancy, so you sent out an e-mail to the
8 faculty?

9 A. Mm-hmm, but I don't think I
10 have to. I choose to.

11 Q. You also posted it on Open
12 Market?

13 A. Yes.

14 Q. What is Open Market?

15 A. This is complicated.

16 Q. Sure.

17 A. So, if I declare a vacancy,
18 when Ms. Kaalund told me she retired, I put
19 her into removal. So, I created a vacancy
20 for a guidance counselor. When you create
21 a vacancy on the school budget system, it
22 sends that information to something called
23 the Open Market system, which broadcasts
24 citywide saying that Randolph has a
25 guidance counselor position open.

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2 People can see that citywide.

3 So, if you remember someone who a guidance
4 license and you were looking for a job, you
5 could go on that system. You could not
6 only see that I had one, but you could see
7 where they were citywide.

8 Q. So, it's like a central
9 database for New York City Department of
10 Education employees where they could look
11 to see what vacancies are available?

12 A. Or perspective employees.
13 Like, if you were looking to get into
14 teaching and you had a teaching license or
15 you had a guidance license and you were new
16 to the system, you could also go on to this
17 and see if there were vacancies.

18 Q. I see, okay.

19 If you have a vacancy --
20 obviously you did in this case -- are you
21 required to post it on Open Market?

22 A. No, you are not.

23 Q. Why did you do it in this
24 particular case?

25 A. Because I was look for a

1 D. FANNING

2 vacancy. I was looking for résumés. I was
3 interested in interviewing multiple
4 candidates.

5 Q. Okay.

6 A. So, I wanted to make sure I put
7 it out there.

8 Q. If you had someone in mind that
9 you liked for the position --

10 A. I could.

11 Q. -- you could, I guess my
12 question is, you can hire that person
13 without actually posting the vacancy on
14 Open Market; is that correct?

15 A. I not only can, but I have.
16 Case in point, this year, I had a student
17 teacher had worked in my building for about
18 a year and a half. I had observed her
19 several sometimes. She was trained by
20 members of my faculty.

21 I knew everything I wanted to
22 know about her. When I hired her, I
23 created the vacancy and staffed her in that
24 position simultaneously. So, that vacancy
25 never appeared on the Open Market.

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2 Q. So, no one would have an
3 opportunity to apply for that position
4 because you knew you wanted that particular
5 candidate for the position?

6 A. Correct. I wasn't interested
7 in looking. I am not required to canvas.
8 Like, for assistant principals or
9 principals, there is a legal requirement
10 that you canvas.

11 Q. Right.

12 A. I don't have a legal
13 requirement to canvas for a teaching
14 position. If there was someone that I am
15 aware of that is licensed and qualified and
16 I wish to hire them, then I don't have to
17 canvas that position.

18 Q. Understood.

19 Now, aside from sending an
20 e-mail and also posting on Open Market, did
21 you actually physically post a posting in
22 the school for this position mor no?

23 A. I e-mailed people. I am not a
24 big paper person.

25 Q. Prior to your sending that

1 D. FANNING

2 e-mail and prior to your posting the
3 vacancy, did you know that Ms. Bastian had
4 a master's in guidance?

5 A. She has mentioned that to me
6 frequently.

7 Q. And so, you knew that she had
8 interest in a guidance position?

9 A. I also specifically mentioned
10 it her.

11 Q. But you did not feel, for
12 example, you just mentioned that you had a
13 candidate that you wanted specifically for
14 a position, so you posted the vacancy and
15 simultaneously appointed a candidate.

16 You did not do that with
17 Ms. Bastian in this case, correct? So, for
18 example, you said that you canvassed
19 because you wanted to interview different
20 people for this particular guidance
21 position, correct?

22 A. Correct.

23 Q. And you knew at the time,
24 though, that Ms. Bastian had the
25 qualification to be a guidance counselor,

1 D. FANNING

2 correct?

3 MR. RENAGHAN: Objection.

4 A. I never actually observed her
5 acting in a guidance capacity.

6 Q. I am not questioning your
7 judgment.

8 A. There is a significant
9 difference between the two. A student
10 teacher is like an intern. I had someone
11 who worked as an intern for a year and a
12 half, so I kind of knew all their
13 qualifications.

14 Melissa has told me about her
15 qualifications, but I had never observed
16 her in a guidance capacity, nor was I
17 convinced that she was definitely someone
18 that I necessarily wanted to hire. So, I
19 did open it up to a hiring panel.

20 Q. After you did open it up and
21 after you did canvas, you did receive an
22 application from Ms. Bastian?

23 A. Mm-hmm, yes.

24 Q. That included a résumé?

25 A. It did.

1 D. FANNING

2 Q. And references?

3 A. Yes, I believe.

4 Q. And Ms. Bastian was not
5 selected for the position, correct?

6 A. To be clear, the guidance
7 counselors were interviewed by a panel of,
8 like, seven people that was very diverse,
9 which included two African-American
10 guidance counselors. And she was not
11 listed as even one of the top candidates.

12 Q. Do you believe that Ms. Bastian
13 has the skills necessary to be a guidance
14 counselor?

15 A. I believe Ms. Bastian has the
16 skills necessary to be a guidance
17 counselor. Unfortunately in this case, I
18 don't think she was the most qualified
19 amongst the applicants to be selected for
20 this position.

21 Q. Understood.

22 But you do believe that she
23 does have the skills necessary to be a
24 successful guidance counselor somewhere at
25 some point?

1 D. FANNING

2 A. It would depend on the
3 applicant pool. I don't know if she would,
4 under what circumstances, she would be the
5 best choice. But the State of New York has
6 given her a license to be a guidance
7 counselor and she is licensed to be a
8 guidance counselor in New York State.

9 Q. I understand that she wasn't
10 the best candidate here. The panel felt
11 that someone else was a better candidate,
12 right?

13 A. Several other people of the
14 candidates.

15 Q. I am not saying this was your
16 decision.

17 A. No, no, she wasn't even one of
18 the top candidates. She didn't do very
19 well.

20 Q. You say she didn't do very
21 well. You mean at the interview?

22 A. When I interview them, I do
23 like to see a dirty process. There are
24 five questions that I pose to every single
25 candidate. All the people on the hiring

1 D. FANNING

2 committee rate the response of each
3 candidate on a scale of one to five and
4 then they come up with a total number per
5 candidate.

6 So, when we finished the whole
7 process, every candidate has a total score,
8 which is a composite of all them being
9 added up. Ms. Bastian was the had the
10 lowest score out of about six candidates.

11 Q. That said, she did not perform
12 well at the interview, right?

13 A. No, not at all.

14 Q. But do you believe that she
15 could be a good guidance counselor
16 somewhere?

17 A. No.

18 Q. Why not?

19 A. Because I don't think she has
20 the background or the experience with
21 working with students and people that would
22 lead someone to be a good guidance
23 counselor. I think she is a great
24 secretary.

25 I don't think she has the same

1 D. FANNING

2 kind of, if you look at the résumés of
3 people who apply for these position, a
4 guidance counselor is a good job, very
5 well-paying job.

6 People have backgrounds in
7 social work. They have advanced degrees.
8 They have worked with agencies. And she
9 just doesn't have those qualifications it.
10 It's a tough applicant pool.

11 Q. Now, you mentioned there were,
12 Hugh Ramirez, Burke, Maynard-Kaalund,
13 Florence something?

14 A. Grosvenor.

15 Q. And Estanfania Moronta?

16 A. Right.

17 Q. These are the current guidance
18 counselors at the school, correct?

19 A. Yes.

20 Q. Are you familiar with a
21 Mr. Ezequiek Perez?

22 A. I am.

23 Q. Who is Mr. Perez?

24 A. Mr. Perez was a guidance
25 counselor at the time when I came to the

1 D. FANNING
2 C E R T I F I C A T E
3

4 STATE OF NEW YORK)
5 COUNTY OF NEW YORK) : SS.:
6

7 I, JOSHUA B. EDWARDS, a Notary Public
8 for and within the State of New York, do
9 hereby certify:

10 That the witness whose examination is
11 hereinbefore set forth was duly sworn and
12 that such examination is a true record of
13 the testimony given by that witness.

14 I further certify that I am not
15 related to any of the parties to this
16 action by blood or by marriage and that I
17 am in no way interested in the outcome of
18 this matter.

19 IN WITNESS WHEREOF, I have hereunto
20 set my hand this 30th day of August 2014.

21

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23

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JOSHUA B. EDWARDS, RMR, CRR

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